Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-715

MARIANNE BEACH EDWARDS, Petitioner,

v.

SUPREME COURT OF THE STATE OF CALIFORNIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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THE STATE OF CALIFORNIA

I, MariAnne Beach Edwards, petitioner, pray that a writ of certiorari issue to review the judicial procedures of the Supreme Court of the State of California practiced in the below entitled case entered 1 December 1975.

CITATION TO OPINION BELOW

The questioned procedure of the Supreme Court of the State of California led to the judgment printed in Appendix B, infra, pp. 22-57. The judgment is reported in Estate of Beach (1975) 15 C 3d 623, with pp. 645-646 containing the subject area discussed herein.

JURISDICTION

The surprise judgment of the Supreme Court of the State of California was entered 1 December 1975. I, the petitioner herein, was not a participant in the judicial processes leading up to the above mentioned decision, a portion of which, handed down in rem, purports to include my property. Estate of Beach (supra) Appendix B, infra, pp. 52-55. On 30 January 1976 opposition to the judgment was barred and the remittitur sent down to the Superior Court of the State of California In and For El Dorado County. On 25 March 1976 I was served notice, along with a copy of the decision, alerting me my property was subject in the decision.

All the judicial processes I have initiated in the confines of the state courts to date have been timely.

Establishment of federal claim has been accomplished when I pleaded procedural due process was denied me by the

the state's highest court during the processes leading up to Estate of Beach (supra) when I appeared before the Superior Court of the State of California In and For El Dorado County which on 22 June 1976 issued MEMORANDUM DECISION. Appendix B, infra, pp. 58-62 . This MEMORANDUM DECISION makes note of my assertions my due processes were denied me and expresses a sympathetic attitude towards my judicial experience in the highest state court, but declares the court "bound" by the decision of the Supreme Court of the State of California.

I pleaded my due process protections under Amendment Fourteen were unhonored in a brief timely presented in the Court of Appeal of the State of California In and For the Third Appellate District and it issued its opinion on 1 February 1977. It turned me down as well stating it was also bound by the governing decision of the Supreme Court of the State of California. Appendix B, infra, pp. 63-66.

On 31 March 1977 a timely petition for a hearing before the Supreme Court of the State of California asserting that during the processes leading to Estate of Beach (supra) violations of procedural due

process as is protected by Amendment Fourteen had occurred, was summarily denied. The topical index of that petition is found at Appendix B, infra, pp 67-68. On 9 April 1977 I filed a writ for extraordinary relief with the Supreme Court of the State of California again asserting my contention that that court violated my constitutional protections when handing down its surprise in rem decision which involved my property. The denial without comment of the writ for extraordinary relief on 25 August 1977 finalized all state court recourses for the relief I seek herein.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257 (3).

QUESTION PRESENTED FOR REVIEW

Whether a state may consistent with due process of law required by the Fourteenth Amendment, Section 1, Clause 2 to the United States Constitution, separate a citizen from her property, bestowed firstly by a court order devoid of any limiting contingencies; then secondly remove said property without notice or day in court by a decision handed down in rem?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution, Section 1, Clause 2: "* * * nor shall any State deprive any person of .... property without due process of law * * *."

STATEMENT OF THE CASE

I, MariAnne Beach Edwards, petitioner, was not a litigant in the judicial process which eventually led to the decision Estate of Beach (1975) 15 C 3d 623. The contest leading to the decision was initiated by my sister, Joette Beach Carter, and my mother, Myrle Anne Travaillie, who acted as guardian for my minor sister, Schuyler Jean Beach, and for my minor brother, Scott Gregory Beach.

My Father, Seth G. Beach, died 4 August 1968 leaving a Will naming his four children as principle heirs-beneficiaries. He designated the Bank of California, National Association, as executor-trustee to his estate.

Under the professional influence of their attorney, despite my attempts to

discourage them, my sister, Joette Beach Carter, and my mother, Myrle Anne Travaillie, acting as guardian, initiated a contest against the bank-executor-trustee questioning the handling of a security held in the estate. At the trial court level the respondent-bank prevailed. The contest went to the appellate court after which I was informed the case was to return to the trial court again so that a trial before a jury could take place. (Originally a jury trial had been denied the contestants.) But this information was untrue. Rather than returning to the superior court, the contest, unbeknownst to me, went to the Supreme Court of the State of California. Also, unbeknownst to me, paralleling the question of the deportment of the bank-executor-trustee was the question of responsibility for the legal fee incurred during the contest. The attorney for the contestants asked the court to make me, a non-contestant heir, responsibile for a pro rata portion of the legal fees he was creating in his unsuccessful litigation. In this he was successful. Estate of Beach (supra) Appendix B, infra, pp. 52-55. This explains my beneficial interest

in the decision.

The one-quarter pro rata portion of the legal fees for which I am allegedly responsible amounts to $16,325.00.

The attorney for the contestants had little difficulty convincing the Supreme Court of the State of California of my so called responsibility for legal fees as I was not given any opportunity to make any assertions. The hearing before the Supreme Court of the State of California took place on 17 October 1975 and my property was subject therein; and because of professional carelessness or whatever, I was not served notice of that hearing. California Probate Code, Sections 1215-1215.4 required service upon me alerting me to those procedures. Appendix A, infra,pp 19-21.I was not so served notice nor alerted to the fact my property was subject in the procedures therein. Any arguments in response to this writ suggesting otherwise are absolutely false and I would request proof of services.

All parties involved in the contest leading to Estate of Beach (supra) knew of my existence and mailing address.

The property interest subject in

the 17 October 1975 hearing before the Supreme Court of the State of California was distributed to me by court order one year earlier on 15 October 1974. Appendix B, infra, pp.70-73 . There are no contingencies in the order in regards to all the distributed property placed under my ownership. Moreover, at the time of distribution I submitted a letter to the probate court which, even though I had possession of the property, I did not release my rights as a beneficiary, and rights would include service of any notice of procedures which threatened the property in my possession.

However, without notice of any nature nor information of the pendency of the property in my possession within the state's highest court, I was denied my day in court by the attorneys in the action who were statutorily required under California Probate Code, Sections 1215-1215.4 to serve me such notice.

There exists now an order issued by the Superior Court of the State of California In and For El Dorado County designed to separate me from $16,325.00. This order owes its existence solely to the harmful 1 December 1975 decision of

the Supreme Court of the State of California. All efforts to quash this order have failed because of the binding state supreme court decision.

It is the state court of last resorts which I assert violated my due process protections as are provided by Amendment Fourteen, Section 1, Clause 2 of the United States Constitution and as are defined by this Court's decisions.

REASONS FOR GRANTING THE WRIT

There exists a direct conflict between the procedure exercised in the action of the Supreme Court of the State of California in handing down Estate of Beach (supra) and those basic procedural requirements of assuring due process emphasized in the bench mark decision issued by this Court in Mullane v Central Hanover Trust Co. (1950) 339 U.S. 306, 314. Not only was I not served notice nor made aware of the hearing of 17 October 1975 before the Supreme Court of the State of California which led to the decision Estate of Beach (supra), I was also unaware property placed under my jurisdiction by court order was

threatened therein. Moreover, the property had been commingled with that of my husband's who as a third party had nothing to do with the estate involved in the litigation.

The deficiencies in due process which I have experienced in this situation are also blatantly and explicitly foreclosed in Goss v Lopez (1975) 419 U.S. 565, 579 and Mathews v Eldridge (1976) 424 U.S. 319, 333.

What the California state courts have permitted me to date is access to inferior courts preordained by the binding decision of the state's highest court. I have been thereby effectively denied access to any court possessing unencumbered authority to freely and openly review my contentions in violation of procedural due process as is set forth in Amendment Fourteen. "* * * nor shall any state deprive any person of .. .. property without due process of law * * *."

> "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."

Mathews v Eldridge (supra) p. 333. Is it

not predisposed any hearing where property interest is subject take place before a tribunal, unencumbered in its adjudication, with freedom to decide the property's disposition? No such unrestricted hearing has been experienced in the instant case.

Even though I pray for relief herein from actions of the Supreme Court of the State of California created by that court's unexpected decision, I would hope this petition will aid in focusing on an increasing public menace. I am a lay person defending my property without the aid of an attorney. The defense I put forth is not against the court system's attack on my property, but the attack from lawyers. Unfortunately, many lawyers rightly conclude people will either offer no resistance to the games they play with other people's property or will employ another lawyer. At worse, in their thinking, they create legal fees for opposing lawyers. More and more lawyers are preying on the public, crowding court dockets with needless litigation accomplishing nothing but the creation of legal fees. Legal processes have become encumbered with procedural

rigmarole and unnecessary routines that are designed more to enrich the lawyers than serve the public.

I have firsthand experience on how lawyers can manipulate the court system. In the instant case the lawyer for the contestants-heirs in the litigation leading to the harmful decision from which I am herein seeking relief introduced the question to the court I should be forced to be equated with his clients in paying the legal fees of the attorneys who put up the defense for the respondent-bank. The result of the contestants' attorney's legal tactics has been the creation of a legal confrontation between the attorney for the respondent-bank and myself while the troublemaking attorney remains on the sideline. Had the contestants' lawyer exhibited respect for constitutional rights of due process and exercised professional care by abiding with mandatory probate codes in regards to service, see California Probate Code, Sections 1215-1215.4; Appendix A, infra,pp 19-21the dilemma I face could have been avoided.

My case is not singular in that problems are created by lawyers attempting

to manipulate justice. By reading the newspapers I have learned lawyers, with their increasingly persuasive influence, are gaining control over the court system. Just as a severely obese individual is dominated by his condition, so now is our court system dominated by lawyers. With no disrespect, lawyer's influence has reached a latitude whereby the courts are now the servants of lawyers rather than the reverse.

This trend of increasing influence is detrimental to the Judicial Branch of our government. In our country today no special interest has as much influence over a branch of government as the Bar has over the Judicial Branch. We have reached a point where its difficult to identify the boundary which separates the two, so perverse is the lawyer's influence. For by inundating the court system with a flood of needless litigation, by exercising lawyer's professional care in a negative sense. by just overwhelming the judicial processes with troublemaking legal problems, the law industry is dominating our justice system. And because the law industry has a monopolistic control over what is and

what is not in their interest, they have virtually a free hand in determining the trends in jurisprudence. One need not be a keen observer of today's scene to determine this trend is going in a direction away from the public's welfare. The trend has already entrenched lawyer's welfare well ahead of both that of the public's and that of the court system's. That lawyer's welfare predominates is frightening for it is they who one would expect to be standing behind our court system in protecting the meaning of our Constitution. Rather, they are standing in the forefront protecting their special interest.

It is right to focus on the Preamble of our Constitution; and I wish this petition would allow some lawyers to do so:

> "We the people of the United States in order to form a more perfect Union, establish justice, insure domestic tranquility.....promote the general welfare, and secure the blessings of liberty....do ordain and establish this Constitution.... ."

I would ask the law industry, with its mandate from the people which allows

it to operate virtually unrestricted, what contributions it makes to protect and promote the precepts of the Preamble of our Constitution? Rather than protect and promote these precepts, it selfishly has set them aside for its own special welfare with a public be damned attitude. This attitude is exhibited in the instant case by the actions of the attorneys involved and by that portion of the decision from which I seek relief. Outright, I am being victimized by the problems created by lawyers; but the Supreme Court of the State of California, in its ruling, promotes such victimization. It declared surveyance of professional trustees was important to heirs. Without a doubt, based on my firsthand experience as an heir, surveyance of lawyers is far more important to heirs who hope to protect their property.

I am not so naïve to realize issuance of the writ as prayed herein will resolve the enormous problems faced by the judicial system and the public. But the monopolistic law industry generally and the lawyers specifically who created my problem should be thwarted. If I had elected to turn my back on my

problems and surrendered to the wishes of the attorneys involved in the contest leading to Estate of Beach (supra), I would be accepting what the law industry has created; a society controlled by their special interest. Moreover, had I employed an attorney to protect my threatened property, I would be contributing to the very conspiracy the law industry is promoting; so I refused to do so. The law industry is virtually breeding on itself and something must be done.

I feel if the writ is issued, it will be a symbol. It can be nothing else, so complex and enormous are the problems created by the law industry. Issuance will show, however small, there are those in our country refusing to accept the trend toward a pattern of controlled justice which is weighed in favor of the law industry's special interest to the detriment of the public's welfare.

CONCLUSION

During my entire judicial ordeal I have been denied opportunity to appear before a state tribunal with judicial

jurisdiction to fairly hear my assertions. Certainly no law can be permitted to be applied in a judicial process without giving a citizen who is affected by it an opportunity to be heard. No such opportunity has been offered me. Those lower state courts to which I received access were preordained to automatically abide with the ruling sent down from the state's highest court. And the state's highest court has summarily denied me access. I do not believe, under any standard, protections afforded me by Amendment Fourteen of the United States Constitution, have been provided by the irregular circumstances I have faced. If the writ respectfully requested herein is not issued, I shall be separated from my property without ever being given my right of an opportunity to be meaningfully heard before a tribunal with jurisdiction to adjudicate freely.

Respectfully submitted,

November 13, 1977
Date

Marianne Beach Edwards
MARIANNE BEACH EDWARDS
in propria persona

Service of this Petition to these parties:

GEORGE M. McCLARRINON, ESQ.
926 J Building, Suite 609
Sacramento, California 95814
Attorney for Joette Beach Carter and Myrle Anne Travaille, guardian for Schuyler Jean Beach and Scott Gregory Beach.

VINCENT CULLINAN, ESQ.
100 Bush Street, Suite 1100
San Francisco, California 94104
Attorney for The Bank of California, National Association, Executor-Trustee of the Estate of Seth G. Beach, Deceased.

CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA
455 Golden Gate Avenue
San Francisco, California 94102

CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR EL DORADO COUNTY
Main Street
Placerville, California 95667

APPENDIX A

ARTICLE 1.5 NOTICE IN TRUST PROCEEDINGS (NEW)

1215. Definitions

As used in this article:

(1) "Notice" means notice of hearing which is to be sent by mail or personally served:

(2) "Trust proceeding" means a judicial proceeding involving a trust provided for by Chapter 10 (commencing with Section 175) of Division 1, or Chapter 19 (commencing with Section 1120) of this division, including but not limited to proceedings for instructions, for settlement of trustee's accounts or distribution of trust assets upon partial or final termination of the trust.

(Added by Stats. 1974, c. 171, p. 328 s1.)

1215.1 Notice in future interests cases

Subject to other provisions of this article, it is a sufficient compliance with Sections 1120, 1123.5, 1125, 1125.1, 1126, 1138.6, * * * 1139.7, and 1139.15, insofar as they require notice to be given to the beneficiaries of, or persons interested in the trust, or to beneficiaries or remaindermen, including all persons in being who shall or may participate in the corpus or income of the trust, to give notice in the cases hereinafter provided, as follows:

(1) When an interest has been limited on any future contingency to persons who shall compose a certain class upon happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if such event had happened immediately before the commencement of the proceedings.

(2) When an interest has been limited to a living person, and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are, or may be, the distributees, heirs, issue or other kindred of such living person, notice shall be given to such living person.

(3) Except as otherwise provided in subdivision (2), when an interest has been limited upon the happening of any future event to a person, or a class of person, or both, and the same interest, or a share of such interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first such event.

(Added by Stats. 1974, c. 171, p. 328 s1. Amended by Stats. 1976. c. 144, p.---, s3.)

1215.2 Conflicts of interest in subject matter

Notwithstanding the provisions of Section 1215.1, notice shall be given to persons who would not otherwise be entitled to notice under such section, when a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is given and a person to whom notice need not be given under Section 1215.1.

(Added by Stats. 1974, c. 171, p.329 s1.)

1215.3 Additional notices; appointment of guardian ad litem

(a) The court, upon its own motion or

on request of a person interested in the trust, at any stage of the proceeding may do either or both of the following:

(1) Require that additional notice be given pursuant to Section 1204, and prescribe the form and method of such notice.

(2) Appoint a guardian ad litem to represent the interest of a minor, incapacitated, unborn, or unascertained person, or a person whose identity and address are unknown, or a designated class of persons who are not ascertained or are not in being. When not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(b) For the purposes of this section, a trustee is a person interested in the trust.

(Added by Stats. 1974, c. 171, p. 329 s1.)

1215.4 Effect of article on other notice requirements

Nothing in this article affects requirements for notice to a person who has requested special notice or filed notice of appearance pursuant to Article 1 (commencing with Section 1200) of this chapter, or pursuant to any other statute, or for notice to a particular person or entity, or for appointment of a guardian ad litem pursuant to Section 1120 or Section 1138.7, or for delivery or mailing of a copy of the petition pursuant to Section 1120. Without obtaining a court order therefor, the petitioner or other person required to give notice may cause notice to be given to any person interested in the trust.

(Added by Stats. 1974, c. 171, p. 329, s1.)

APPENDIX B

Estate of Beach (1975) 15 C 3d 623

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

Estate of SETH G. BEACH, Deceased.	Supreme Ct. Filed: Dec. 1, 1975
BANK OF CALIFORNIA, as Executor. etc. Petitioner and Respondent, v. JOETTE BEACH CARTER, et. al., Objectors and Appellants.	S.F.23224 (Super.Ct. No.5204)

Seth G. Beach died on August 4, 1968, leaving an estate valued at over $2.4 million. His will, after making a number of smaller dispositions, placed the bulk of his estate in a testamentary trust for the benefit of his four children and named the Bank of California as both executor and trustee. The estate included 27,700 shares of Reserve Oil and Gas Company (Reserve) common stock appraised at $391,262.50, or $14.125 per share. In June 1969 the executor sold 3,000 shares of the stock for approximately $16 per share to raise funds toward the payment of claims, taxes and expenses of administration. By the time the remaining 24,700 shares were distributed to the testamentary trustee in September 1970, their value had declined to little

more than $6 per share.

Three of the four residuary trust beneficiaries filed a contest of the executor's first account (Prob. Code, §§ 927) #1/ claiming the estate was entitled to damages from the executor for the latter's alleged negligence in not selling the stock while its market price was above its appraised value at the date of death. After discovery proceedings and a six-day nonjury trial, the trial court found that the executor had exercised due care in retaining the stock and accordingly rendered judgment rejecting the exceptions to the account and declaring the account settled. #2/ Appealing from the judgment, #3/ objectors (hereafter contestants) assert that the trial court applied an incorrect standard

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#1/ All section references hereinafter are to the Probate Code unless otherwise indicated.

#2/ The probate court properly incorporated the settlement of the account into the judgment resolving the contested issues (§ 1230) rather than making a separate order for settlement. (Estate of Jamison (1951) 107 Cal. App. 2d 483, 485-486.)

#3/ Section 1240, authorizing appeals from an "order ...settling an account of an executor," was enacted as a continuation of former Code of Civil Procedure section 963, subdivision 3, which authorized appeals from a "judgment or order" settling an executor's account, and therefore authorized the present appeal from the judgment. (Estate of Jamison, supra, 107 Cal. App. 2d at pp. 484-485.)

of care in exonerating the executor from negligence and that in any event the finding of no negligence is unsupported by the evidence. We conclude that the executor was not negligent if it exercised ordinary care in applying the skills and knowledge ordinarily possessed by banks engaged in the trust business under similar circumstances to the administration of the present estate, and that the evidence sufficiently shows that the executor met this standard. We reject the contestants' contention that the bank can be called to account for performance of its duties as trustee in the present proceeding for settlement of its account as executor even though it might have to give due consideration to the existence and terms of the trust and the circumstances of the beneficiaries of the trust in order to properly carry out its duties as executor in the probate administration of the estate.

With regard to other contentions on appeal, we conclude that the trial court committed no error in denying contestants' demand for a jury trial, in allowing the executor extraordinary compensation for defending against the contest, and in making an order subsequent to the judgment (separately appealed from) allowing the executor's attorneys extraordinary fees for such defense. However, such compensation and fees should have been charged against the entire estate instead of against only the contestants' interest based on deferral of some of its compensation. With modifications to eliminate these errors, we affirm the judgment and the order.

Bank's Alleged Liability as Executor for Retention of Stock in Estate

An executor is not liable for losses suffered by the estate without his fault (§§ 920) but may be required to reimburse the estate for losses proximately resulting from his failure to exercise the requisite duty of care in its administration (Estate of Guiol (1972) 28 Cal. App. 3d 818). The standard of care generally applicable to executors is "that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature." (Estate of Moore (1892) 96 Cal. 522, 525; Estate of Barbikas (1959) 171 Cal.App.2d 452, 457-458.) However, as a bank engaged in the business of acting as a fiduciary for estates and trusts (see Fin. Code, §§ 106-107, 1502), the executor could be held liable for negligence if it failed to exercise the skill and knowledge ordinarily possessed by such professional fiduciaries. (Gagne v. Bertran (1954) 43 Cal.2d 481, 489; Rest. 2d Torts, §§ 299A.)

Contestants claim that the judgment is not supported by the evidence. To consider this contention, we review the facts, viewing the evidence in the light most favorable to the executor and indulging in all reas nable intendments and inferences that tend to sustain the judgment. (McCarthy v. Tally (1956) 46 Cal.2d 577, 581; Berniker v. Berniker (1947) 30 Cal.2d 439, 444; Estate of Bristol (1943) 23 Cal.2d 221, 223.)

Under the decedent's will the residue of the estate left in trust was to be divided into four shares, one for each of the testator's children. One third of

each child's share was to be distributed to him or her at age 25, one third at age 30, and the remaining third at age 35, with periodic distributions of income from the part of the share held in trust. The decedent's four children were: Marianne Beach Edwards, born June 1, 1939; Joette Beach Carter, born January 1, 1942, and twins named Scott Gregory Beach and Schuyler Jean Beach, born November 19, 1952. Thus, upon the dececent's death both Mrs. Edwards and Mrs. Carter were eligible to receive one third of their trust shares, and Mrs. Edwards became eligible for an additional third nine months thereafter. Only Mrs. Carter and the twins are contestants in the present proceeding.

The principal assets of the estate and their appraised values as of the date of death were 27,700 shares of Reserve common stock ($391,262.50); Reserve convertible debentures ($117,625); Mother Lode Bank common stock ($300,600); government and public utility bonds ($691,238); real estate ($387,000); a lumber business which was liquidated during administration ($299,389); and cash, notes, insurance and miscellaneous items ($235,680).

The Reserve stock was listed on the American Stock Exchange. The company's main activity was the exploration for and production of oil. The stock paid no dividend, and the company's earnings were "flat," lacking any significant increase or decrease. The principal attraction of the stock was the prospect of capital growth through oil exploration activities.

Donald T. Dooling, the bank's trust officer immediately in charge of the estate, testified that when administration commenced in August 1968 he was

concerned about the size of the Reserve holding and discussed the matter with Roger Newell, head of the bank's portfolio management section, who replied within a week or two that no immediate steps were necessary. Newell testified that on receiving Dooling's inquiry he went to the securities research section to read available information concerning Reserve and discuss the stock with the section's security analysts, whose function was to analyze individual securities and industries as well as general economic conditions. Newell concluded there was no reason to recommend immediate sale of the stock because he found no apparent "deterioration" in the company's balance sheet, management, or other "fundamentals."

The following December, the bank's trust investment committee (T.I.C.), responsible for portfolio management decisions, made an "initial review" of the estate's assets and decided to retain the stock because of the absence of deterioration in the company. In January 1969 the same committee considered what assets should be sold to raise cash needed for administration and decided "to continue with the program to sell the real estate assets and to defer sale of Reserve." The reasons for this decision were (1) that the real estate required current expenditures from the estate and was not as readily marketable as a listed stock, which could be sold later if and as needed, and (2) the absence of any evidence of deterioration in Reserve.

In February 1969 the bank's trust securities committee (T.S.C.) recommended that holdings of Reserve stock be sold. However, the T.S.C.'s recommendation was based on information furnished by the securities research section concerning the stock itself, without regard to the nature of the trust or estate in which the stock might be held. Despite the T.S.C.'s recommendation, the T.I.C. decided to retain the Beach estate's holding of the stock because of the continued absence of any sign of deterioration in the company.

In May 1969, Dooling reported to John Pierson of the portfolio management section that the estate required $390,000 of additional cash to conclude administration and suggested consideration of a sale of part of the Reserve holding for this purpose. *5/ About this time it was learned that the Reserve convertible debentures held by the estate would be called for redemption on July 16th at a price below the current market price. To avoid a loss through redemption the estate would have either to sell the debentures or to convert them into some 7,600 shares of common stock thereby increasing its stock holdings to some 35,300 shares. Under these circumstances the T.I.C., on advice from the portfolio management section, decided to raise the needed cash by

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*5/ The estate's cash needs included $200,000 for California inheritance taxes and $611,000 for federal estate taxes. Cash was available to the estate not only from the cash assets but also from the maturing of some of the bonds and the sales described in footnote 4, ante, of about one-third of the estate's real property.

selling the debentures, 3,000 shares of the stock, and certain short-term government bonds. Based on court authorization received on June 24, 1969, the executor sold the debentures for $119,500 and the 3,000 shares of stock for $47,607, reducing the estate's holding of the stock to 24,700 shares. Newell testified that in recommending this sale the portfolio management section felt that "some reduction of Reserve was in order," that the "one-third reduction" [35,300 to 24,700 shares] was "appropriate," and that the remaining Reserve stock was acceptable for distribution into the trust because the company remained fundamentally sound and the stock had "some long-term potential for increase in value."

In July and August of 1969 the stock's market price commenced a gradual decline which continued into the following May and was followed by a moderate rise until distribution to the trustee in the fall. *6/ The bank's security analysts interpreted this decline as a reflection of a downward

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*6/ An exhibit showing monthly price ranges on the American Stock Exchange indicates that the stock reached its high point for the period of probate administration in June 1969, when the price per share ranged between 14-3/8 and 20-7/8. There was then a gradual decline to a range of 7-3/4 to 10-3/4 in December 1969 and thence to the low point of May 1970, when the price ranged between 4-5/8 and 7-3/8. Distribution of the stock from the executor to the trustee was ordered on September 28, 1970, and acknowledged by the trustee's receipts dated October 6, 1970. The stock's price range fro September was 7-1/4 to 10 and for October was 8 to 10-5/8.

The trial court's findings and memorandum decision state that at the conclusion of probate the stock was worth "approximately $6.00 per share." Contestants' pleadings, filed August 7, 1970, and amended August 26, 1970, claimed damages based on an alleged current value of $6 per share. This allegation was apparently based on the information reflected in the foregoing exhibit which showed a price range of 5-3/8 to 7-7/8 for July 1970 and of 6-1/8 to 8 for August 1970.

trend in stocks generally which was particularly pronounced in oil stocks and not as indicating any deterioration in Reserve's operations or prospects. *7/

In determining that the Reserve stock was suitable for inclusion in the trust, the bank's portfolio management section considered the circumstances and resources of the trust beneficiaries and determined that the tentative objectives of the trust should include not only the production of income but also long-term capital growth as a protection against inflation. None of the beneficiaries or their families had any special problems of ill health or disability which would require unusual amounts of income. The twins in addition to having interests under the trust were the beneficiaries of a settlement agreement between their mother and the decedent under which the estate was paying $500 per month for their benefit in child support and was obligated to pay the expenses of their college educations. Assets distributable to the trust other than the Reserve stock were

*7/ A security analyst employed in the bank's securities research section testified that between June 1969 and September 1970, while the monthly low price of Reserve stock was dropping by about 45 percent, there were corresponding percentage drops in the prices of the following oil stocks: Atlantic-Richfield, 47 percent; Union, 45 percent; Continental, 35 percent; Standard of California, 33 percent; Marathon, 50 percent.

producing substantial amounts of income. *8/ Under these circumstances the growth potential of Reserve was deemed to make it a desirable trust asset despite the fact that it paid no dividends.

On the other hand, the portfolio management section did not base its decision to retain the 24,700 shares of Reserve stock on any standard of diversification. *9/ Its practice was not to attempt to diversify particular investment holdings during probate

*8/ Approximately $72,000 in accumulated income was distributed from the probate estate to the trust: $20,000 by preliminary distribution in April 1969, $12,000 by preliminary distribution in September 1969, and $40,000 by final distribution in September 1970. Moreover, the preliminary distribution of April 1969 included the 16,700 shares of Mother Lode Bank stock, which yielded annual dividend income of $13,360.

*9/ To comply with the standard of the prudent investor laid down by section 2261 of the Civil Code, a trustee is ordinarily required to diversify the trust investments. (Mandel v. Cemetery Board (1960) 185 Cal.App. 2d 583, 587.)

because of the restrictions on the executor's power to reinvest. #10/ Thus the retention of the stock in the estate was based on the executor's determination that Reserve was not in a deteriorating condition, no further cash was needed to complete administration of the estate, and that the stock was a suitable asset for inclusion in the trust.

The bank concedes that as a professional fiduciary its liability must be determined by more stringent standards than would the liability of a lay executor. Those undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.

#10/ The executor could invest cash of the estate only in savings acounts (§§ 585) or certain government securities (§§ 584, 584.1). Contestants suggest that the executor had broader investment powers under section 584.5, which allows the probate court to "authorize a personal representative to invest and reinvest any surplus moneys in his hands in any manner provided by the will." (See also, §§ 584.6.) However, the section did not take effect until November 13, 1968, over three months after the decedent's death, and in any event there was no provision in the will for any such additional forms of investment. Contrary to contestants' argument, the mere absence from the will of expressed restrictions on the executor's powers of investment was not a provision permitting additional forms of investment within the meaning of section 584.5.

(Lucas v. Hamm (1961) 56 Cal.2d 583, 591 (attorney); Gagne v. Bertran, supra, 43 Cal.2d 481, 489 (professional soil tester); Huffman v. Lindquist (1951) 37 Cal.2d 465, 473 (physician); Rest. 2d Torts § 299A; cf. Coberly v. Superior Court (1965) 231 Cal.App. 2d 685, 689 (bank's liability as trustee despite exculpatory provisions of trust).) Proof of liability for failure to possess or exercise these professional attributes requires the testimony of a qualified expert where the claimed injury and its causes are beyond common knowledge. (Brown v. Colm (1974) 11 Cal.3d 639, 643; Cobbs v. Grant (1972) 8 Cal. 3d 229, 236; Lysick v. Walcom (1968) 258 Cal.App. 2d 136, 156 (liability of attorney).)

The bank contends we should accept the findings of its freedom from negligence simply for lack of testimony by qualified experts sufficient to prove its noncompliance with the relevant professional standards. Plaintiff called three expert witnesses who gave reasoned opinions that the bank should have sold more or all of the Reserve stock during the administration of the probate estate. One of these witnesses was president of an investment management firm; another had been in charge of the trust department of a title company #11/ from 1952 to 1966; and a third was director of research for a stock brokerage firm. It is unnecessary for us to consider the sufficiency of these witnesses' expert

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#11/ Title insurance companies have legal authority comparable to that of banks to maintain trust departments for carrying on the business of acting as executor or trustee or in other fiduciary capacities. (Fin.Code, §§ 106, 107, 1501.)

qualifications or testimony because the findings are fully supported by the testimony of the bank's expert witnesses, who included not only those of its employees already mentioned but also an independent securities analyst and a senior trust officer of a competing bank with 38 years of banking experience. The latter witness testified in answer to a hypothetical question that in his opinion and based on his professional experience, the executor's retention of the 24,700 shares of Reserve stock in the estate was prudent and did not deviate from any investment standard in California known to the witness.

It is suggested that the trial court's findings and memorandum decision show that it failed to give proper weight to the requirement that the bank use the skills and knowledge ordinarily possessed by professional fiduciaries in similar circumstances. However, the memorandum decision refers to the last mentioned expert as "(t)he most persuasive witness produced . . . who had excellent qualifications, vast experience, vast knowledge and who impressed the Court as being totally impartial" and further commends the bank's "committee set-up of checks and balances and review within (its) trust department" as "excellent." The findings uphold the bank's exercise of due care "in the manner in which it utilized all of its available relevant internal banking services and procedures" in making the decisions for which contestants seek to impose liability. (See fn. 12, post.) Under these circumstances we are satisfied that the trial court properly judged the bank's conduct by professional rather than lay standards.

Contestants claim that the trial

court erred in determining the bank's liability according to its exercise of care as an executor rather than as a testamentary trustee. *12/ They contend that because the bank received title to the trust assets upon the decedent's death by operation of his will, subject only to probate administration (ss 28, 300; Estate of Lefranc (1952) 38 Cal. 2d 289, 297; Estate of Muhammad (1971) 16 Cal.App.3d 726, 733), the bank acted during probate administration in a dual capacity as executor and trustee, and that its supposed capacity as trustee subjected the bank's decisions concerning the retention or disposition of

*12/ The trial court found: "(The bank) demonstrated its exercise of care and prudence according to the standard of care and prudence prevailing in the State of California for executors of probate estates in the manner in which it utilized all of its available relevant internal banking services and procedures in determining the cash needs of the estate, in determining which assets would be used for payment of administration expenses, and in arriving at and executing its decision to sell 3,000 shares of Reserve Oil & Gas Company common stock during probate and its decision to retain the balance of said share (sic) for distribution to the trusts created under decedent's will." (Italics supplied.) In another finding the trial court declared: "At all times referred to in the contests, the (bank) acted in the capacity as an executor of a probate estate, and not as a trustee" Similarly, the trial court's memorandum opinion stated, "An executor is not a trustee; his duty is to conserve, not to invest."

the Reserve stock in the probate estate to the "prudent investor" rule of Civil Code section 2261. *13/ Contestants

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*13/ The prudent investor rule is embodied in subdivisions (1) and (2) of section 2261 of the Civil Code, which provide as follows:

"(1) In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, disc retion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire for their own account.

"(2) In the absence of express provisions to the contrary in the trust instrument, a trustee may continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust.

are ½artoci;ar;u cpmcermed wotj tje requirement implicit in the rule that investments be diversified (Mandel v. Cemetery Board, Supra, 185 Cal.App.2d 583, 587) and argue that by judging the bank solely on its performance as executor the trial court erroneously failed to consider whether the retention of the unsold shares of Reserve stock in the estate violated this diversification requirement. Although contestants recognize that apart from sections 584.5-584.6 (see fn 10, ante) the executor could not have invested the proceeds from any sale of Reserve stock in anything but savings accounts or government securities (s 584, 584.1, 585), they argue that even those forms of interest-bearing investments would have been preferable to retention in the estate of a disproportionately large holding of a "speculative" stock yielding no dividends.

In making this argument contestants overlook or misconceive basic distinctions between the bank's duties as executor and its duties as trustee. In the first place, the fact that the same bank was named as both executor and trustee in the will is immaterial. Even though the executor in handling estate assets may sometimes be required to take into account the fact that all or part of the net estate will be distributed to a testamentary trust with particular terms and beneficiaries, the executor's duty in this regard does not vary according to whether the executor and trustee are the same or different entities. The present bank's powers and duties as trustee as if the will had named another bank as trustee. (Goad v. Montgomery (1898) 119 Cal. 552, 561

(powers of executor and trustee are distinct); Estate of de Laveaga (1958) 50 Cal.2d 480, 486 (beneficiaries' rights in trust not before court on decree of distribution to trustee); Estate of Freman (1960) 185 Cal.App. 2d 527, 530 (same).)

Moreover, the anticipation that the bulk of the estate would be transferred to a testamentary trustee, which in this case happened to be the same bank, did not require the executor to manage the estate assets as if they were already being held under the terms of the trust. The executor has numerous functions and obligations not normally imposed upon a testamentary trustee, such as presenting the will for probate (§§ 320, 323, 324), locating assets (§§ 571, 581), locating beneficiaries (§§ 326, subd. 3), handling creditors' claims (§§ 700-719, 730-738), providing for any immediate needs of the decedent's family through a family allowance (§§ 680), preparing returns for and paying estate and inheritance taxes (Int. Rev. Code, §§ 2002 (26 U.S.C. §§ 2002); Rev. & Tax Code, §§ 14101) as well as income taxes of the decedent and the estate (Int. Rev. Code, §§ 641 (b), 6012 (b) (26 U.S.C. §§ 641 (b), 6012 (b)); Rev. & Tax Code, §§ 18405) and distributing the remaining assets to the beneficiaries (§§ 1000-1003, 1020-1029). The executor holds land manages the estate assets incidentally to performance of the various duties of administering the estate, in contrast to the testamentary trustee, whose primary mission is to serve the trust beneficiaries under the terms of the trust. Usually, as in the instanct case, such management by the executor concerns the interests of the

trust beneficiaries only through its effect on the nature and value of the property distributed to the trustee and the timing of such distributed to the trustee and the timing of such distribution or distributions. (See Estate of de Laveaga, supra, 50 Cal.2d 480, 486; Estate of Marre (1941) 18 Cal.2d 184, 190.)

The present record reveals that in handling the Reserve stock in the probate estate the executor made three kinds of decision affecting the contestants' interests as trust beneficiaries and supports the trial court's conclusion that in all three areas the executor applied the requisite skills and knowledge and exercised the requisite degree of care. These decisions related to (1) preservation of the estate assets, (2) selection of assets to sell for needed cash and (3) timing of distributions to the trust. Each area of decision will be considered in turn.

A primary duty of the executor is to take reasonable steps to preserve the assets of the estate. (Estate of King (1942) 19 Cal.2d 354, 358; Estate of McSweeney (1954) 123 Cal.App.2d 787, 793; Estate of Smith (1931) 112 Cal. App. 680, 685. *14/ The duty of preservation

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*14 The last two cited cases hold that the executor's primary duty of preservation gives rise to his authority to deposit estate cash in a savings account but that because his duty is to protect rather than invest estate assets, such deposits are not mandatory. The duty to invest became mandatory by the enactment in 1971 of section 920.3, which requires an executor or administrator to show that he has kept cash not required for the estate's orderly administration invested

may require the executor to take affirmative steps to prevent deterioration in value. (Estate of Porter (1900) 129 Cal. 86 (sale of vineyard-orchard to avoid maintenance expenses pending escheat proceeding); Estate of Fernandez (1898) 119 Cal. 579, 585 (care of livestock until sold); Estate of Smith (1897) 118 Cal. 462 (maintenance of vineyard); cf. s 770, authorizing executor's sale without notice of "(p)erishable property and other personal property which will depreciate in value if not disposed of promptly.") However, an executor or administrator is not liable for any decrease in the value of estate assets on account of his acts or omissions done in good faith and without negligence. (s 920 ("He shall not . . . suffer loss by the decrease or destruction without his fault, of any part of the estate"); Estate of Armstrong (1899) 125 Cal. 603, 604-606; cf. Estate of Fraysher (1956) 47 Cal.2d 131, 138-139.)

Contestants argue that the executor's duty of preservation required it in the exercise of due care to sell the Reserve stock before it depreciated in market value, but the authorities upon which they rely indicate that such liability has rarely been imposed. *15/

in interest-bearing accounts or other investments authorized by law. The bulk of the present estate, including the Reserve stock, was distributed prior to this enactment. (See fn. 6, ante.)

*15/ The cases relied upon by contestants are collected in an annotation in 92 A.L.R. 436, Liability of executor or administrator for Loss by Depreciation in Value of Securities, through Retaining or Deferring Sale Thereof. The few cases

The executor normally is not held to account for failure to anticipate fluctuations in the price of a publicly traded stock arising from general market conditions, as distinct from conditions peculiar to the company in which the stock is held. (Estate of Kent (1936) 6 Cal.2d 154, 164-165; cf. Day v. First Trust & Sav. Bank (1941) 47 Cal.App.2d 470, 479.) There was evidence that

where liability was imposed are distinguishable. Thus, in Mathews v. Sheehan (1904) 76 Conn. 654, the administrators were held liable for not effecting a reasonably prompt settlement of the decedent's margain accounts with stockbrokers on the ground that maintaining a "speculative account" in stocks and bonds was equivalent to carrying on a trade or business, which an executor may not do without special authorization except at his own rish. Although the same consequences attach to a personal representative's operation of a business in a California decedent's estate without specific authorization (Estate of Burke (1926) 198 Cal. 163, 166; California Emp. etc. Com. v. Hansen (1945) 69 Cal.App. 2d 767, 770, the executor's mere retention of the Reserve shares in the instant estate did not amount to carrying on a trade or business. In Mellier's Estate (1933) 312 Pa. 157, the administrators were surcharged for refusing to close out securities margin accounts upon the demand of a putative widow whose claim against the estate had been settled by an agreement to pay her a cash amount and who demanded that in a falling stock market the accounts be liquidated at a point at which the remaining value would suffice to satisfy

the decline in the value of the Reserve stock reflected a decline in the market price of oil stocks generally (see fn. 7, ante) and that the executor used reasonable care to become informed about any special circumstances that might affect the value of the stock. Thus, the evidence showed that during the initial two weeks of probate administration and periodically thereafter until distribution the executor ascertained through the research facilities of its investment department, staffed by security analysts and other experts, that there was no deterioration in the financial condition or management of Reserve which would indicate the existence or prospect of a substantial loss of intrinsic value. This evidence supported the trial court"s finding that "Reserve Oil & Gas Company was not in a deteriorating condition at any time during the probate of this estate and the [executor] so determined in the course of considering whether to retain any shares of the common stock of said corporation in the estate."

In addition to the executor's duty to preserve the estate assets, a second area of its responsibility necessarily affecting the contestants' interests in the trust was its selection of which assets to retain for distribution into the trust. Contestants attack the executor's sales of short term government bonds authorized by the probate court

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her claim. [Cf. §§ 754 [authorizing sale of estate property when "necessary" to pay debts, legacies, family allowance or expenses), §§ 758 [any person interested may petition for order requiring executor or administrator to make a necessary sale].]

in June 1969 along with the sale of part of the Reserve holdings. They argue that the executor was negligent in not obtaining the needed cash entirely from a larger disposition of Reserve instead of partly from Reserve and partly from the bonds. *16/ To have retained the bonds for distribution to the trust would have been nearly equivalent to retaining cash for this purpose as the maturity date of the bonds made it probable that some and perhaps all would be converted to cash before administration of the estate was completed. *17/ As previously stated, there was evidence that the executor in deciding not to obtain cash from selling additional shares of Reserve took into account the suitability of that stock for inclusion in the trust, based on the trust's terms, the circumstances and resources of the beneficiaries, the income produced by trust assets other than Reserve, the propriety of capital

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*16/ Contestants do not contend that sales of additional Reserve should have been substituted for the sales of the decedent's residence and other real estate by which the estate was relieved from expenditures for taxes and insurance. [See fn. 4, ante.] The residence was not needed or wanted by surviving family members and until sold was occupied by caretakers compensated from the estate.

*17/ About half of the proceeds from the bond sales was produced by bonds maturing no later than February 1, 1970, and the remaining half came from bonds maturing no later than September 1, 1970. The petition for final distribution was filed July 22, 1970, and distribution of

growth as one of the trust objectives, and a judgment that Reserve stock had long-term potential for increase in value. This evidence supports the trial court's finding set forth in footnote 12, ante, that the executor exercised due care in deciding to retain the stock for distribution to the trust.

A third area of the executor's responsibilities having at least a potential effect on the contestants' interests as trust beneficiaries was the timing of the distribution of particular assets from the probate estate into the trust. Upon such distribution the management of the Reserve stock was freed from the restrictions imposed by the executor's multifarious duties and limited powers and became subject to the broad powers conferred upon the trustee by the terms of the trust. *18/ "It is the established policy of this state, implemented bu sections 1000 and 1001 of the Probate Code, to encourage the distribution of property to legatees as soon as can be done without jeopardizing the rights of others interested in the estate. (Citations.)" (Estate of Toler (1957) 49 Cal. 2d 460, 467; accord, Estate of Hogemann (1965) 63 Cal.2d 131, 136.) Although contestants as trust beneficiaries had standing to petition for prelimininary distribution to the trustee (Estate of Mackay (1895) 107 Cal. 303, 307; Estate of McGirl (1932) 125 Cal.App. 310, 313),

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substantially all remaining assets was ordered on September 28, 1970.

*18/ Four pages of the decedent's will were devoted to the listing of powers conferred upon the trustee "in addition to those now or hereafter conferred by law."

the executor's duty to avoid unreasonable delay in distribution was not dependent on the initiative of a beneficiary. (Estate of Taylor (1967) 66 Cal.2d 855, 858-859.) The record shows that the executor in fact obtained authorization for preliminary distribution of the Mother Lode Bank stock from the estate to the trust in April 1969 (see fn. 8, ante) and indicates no obstacle to preliminary distribution of the Reserve stock if its earlier subjection to trust management had been deemed advantageous. *19/ However, there was no evidence that earlier distribution of the Reserve stock would have resulted in its being sold by the trustee at any price higher than its market value at the time it was in fact distributed.

Right to Jury Trial

Contestants claim the trial court erred in not ordering a jury trial of the factual issues raised by the contest. The executor assets contestants waived any right to a jury trial by

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*19/ There was nothing apparent in the record to prevent distribution of the retained Reserve stock to the trustee as soon as the estate's cash needs had been satisfied by the sale of government bonds, Reserve debentures, and 3,000 shares of Reserve stock authorized in June 1969. The petition for final distribution filed July 22, 1970, showed that property appraised at $1,111,765.38 (including 24,700 shares of Reserve appraised at $348,887.50) was then on hand in the estate for distribution to the trust, subject only to minor obligations for remaining executor's and attorney's fees and closing costs.

failure to make timely demand therefor. We need not pass on the waiver issue in view of our conclusion that even if the jury trial claim was effectively asserted it was properly denied on its merits.

There is no right to a jury in probate proceedings unless that right is granted by statute. [Estate of Van Deusen [1947] 30 Cal.2d 285, 291; Estate of England [1931] 214 Cal. 298, 300.] Thus there are express statutory provisions for the right in will contests before probate [§§ 371] and after probate [§§ 382], contests of allowed claims [§§ 928], determinations of rights to distribution [§§ 1081], and hearings on restoration of "incompetent" persons to capacity [§§ 1471] and termination of conservatorships [§§ 1755].

Urging a broader right to a jury, contestants refer us to a line of cases construing the Probate Code and predecessor sections of the Code of Civil Procedure as granting a right to a jury trial in certain other probate proceedings in which the code expressly authorizes the formation of issues of fact to be tried. [See, e.g. Estate of

Perkins [1943] 21 Cal.2d 561, 566-567 [final distribution).] However, no California appellate decision has declared or recognized any right to a jury trial in the kind of proceeding now before us -- the resolution of exceptions to an executor's or administrator's account. To the contrary this court has consistently rejected any such right. [Estate of Smead [1938] 12 Cal.2d 20, 25; Estate of England, supra, 214 Cal. 298; Estate of Franklin [1901] 133 Cal. 584; Estate of Sanderson [1887] 74 Cal. 199, 204-210; Estate of Moore [1887] 72 Cal. 335, 338-340.]

Contestants point out that the early Moore decision was based in part upon the impracticability of requiring "a jury to wade through, comprehend, and disentangle a long account, or to express an intelligent judgment upon each item" [72 Cal. at p. 338] and argue that the issues in the instant case of whether the executor was negligent in retaining the Reserve stock and if so the amount of resultant damages to the estate were relatively clearcut and as full appropriate for jury consideration as the fact issues in regular civil actions for negligence or professional malpractice. However, there is another characteristic of claims for mismanagement of a probate estate which makes jury resolution inappropriate. Such claims, unlike ordinary claims for negligence or malpractice, are necessarily based on conduct that is subject to the in dependent control and supervision of the very court before which the claim must be asserted. As we said in Estate of Sanderson, supra,

74 Cal. 199, 208: "There may be a manifest propriety in requiring, at the request of a party, issues of fact such as ordinarily arise in the contest of the probate of a will (Was the testator of unsound mind? Was he subjected to undue influence?) to be tried by a jury.

But the proceeding in probate for the settlement of an account is sui generis, bearing but a distant and incomplete analogy to the procedure for an accounting in equity. The executor or administrator derives his power to act as such from the will, or order of the court; but in his conduct of the affairs of the estate, he is subjected largely to the discretion and control of the court. The court is bound to protect the estate, and, as far as may be, the rights of all concerned. Publication is had, that all interested may have an opportunity, by written exceptions, to call the attention of the court to alleged errors or defects; but, in the absence of exceptions, the court may and should inquire into any matter which may seem to the court objectionable, and pass judgment thereon; and in the presence of specific objections, the court is not limited to the specific objections." (See also Estate of Randall (1922) 188 Cal. 329, 335.) In short, to subject the court's determination of the propriety of an executor's acts in the course of administering the estate to contradiction by a jury verdict would tend to dilute and undermine the court's ongoing responsibility for detecting and correcting executorial mismanagement.

Finally, a legislative intent to

disallow any right to jury trial in the present proceeding is implied by section 928, which expressly grants a right to a jury for exceptions to allowed claims, thus indicating exclusion of the right for other exceptions to an account under section 927, as in the present proceeding. (Estate of England, supra, 214 Cal. 298, 300.)

The trial court had discretion to impanel a jury to render an advisory verdict on issues raised by contestant's exceptions to the account. (Estate of Moore, supra, 72 Cal. 335, 339.) However, the court's absolute power to disregard any verdict that a jury might have returned renders pointless any examination on appeal of the denial of contestants' request for an advisory jury. (Stearns v. Los Angeles City School Dist. (1966) 244 Cal.App. 2d 696, 725-726.)

Extraordinary Compensation of Executor and Executor's Attorneys For Defense Against Contests

The principal judgment rejecting contestants' exceptions to the executor's account included provisions (1) reserving jurisdiction to determine the value of the extraordinary services of the executor's attorneys in defending against the contests, (2) awarding the executor $2,500 for extraordinary services in such defense, and (3) ordering that all extraordinary compensation awarded the executor and its attorneys for such defense be charged against contestants' shares of the testamentary trust. Subsequently a petition of the executor's attorneys for extraordinary compensation of $23,665 was filed and heard by the

court, which thereupon awarded them $14,500 for their defense of the contests. Contestants have appealed from this order as well as from the principal judgment.

Contestants' initial objection to these awards is that the costs of defense should have been borne by the executor itself without reimbursement from the estate on the theory that such defense benefitted the executor and not the estate. The expenditures were for the purpose of protecting the executor from unjust surcharbe for conduct in the administration of the estate which the present proceeding has determined to have been perfectly proper. Such expenditures for an executor's or administrator's successful defense against exceptions to his account are chargeable against the estate. (Estate of Beirach (1966) 240 Cal.App.2d 864, 866-868; Estate of Raphael (1954) 128 Cal.App.2d 92, 97.)

Contestants question the amounts of the extraordinary compensation awards. The trial count's findings state that the award of $2,500 to the executor was for answering interrogatories, attending depositions of five witnesses (three of whom were bank employees), conferring with attorneys in preparation for depositions, interrogatories, and trial, and attemding the six-day trial. The executor's attorneys were a partner and an associate of a law firm. The award to them of $14,500 was based not only on the trial court's observation of the contest proceedings but also upon an evidentiary hearing at which the attorneys submitted time records itemizing the services of their firm in the matter

and showing that they would be entitled to compensation of over $24,000 based on hourly rates of $70 for the partner $40 for the associate, and $15 for law student research clerks. In fixing the amount of extraordinary compensation for the executor and its attorneys the court could properly consider not only the time spent but also such factors as the value of the estate, the skills exercised, the amount in dispute, and the results obtained. (Estate of Lanza (1964) 229 Cal.App.2d 720, 726-727; Estate of Walker (1963) 221 Cal.App. 2d 792, 795; Estate of Merritt (1950) 98 Cal.App.2d 70, 76.) The awards must be upheld unless they appear so clearly out of proportion to the services performed as to be an abust of discretion. (Estate of Taylor, supra, 66 Cal.2d 855, 860; Estate of Turino (1970) 8 Cal.App.3d 642, 649.) The amounts of the present awards were within the court's discretion.

Chargeability of Defense Expenditures Against Contestants' Shares of Trust

The trial court exceeded its authority in ordering that the extraordinary compensation of the executor and its attorneys for defending the contests be charged against contestants' shares of the trust. The residue of the estate was distributed in trust for four beneficiaries of whom only three

filed the present contests. Probate Code section 750 provides in effect that in the absence of contrary provision in the will debts and expenses of administration must be paid from the estate in the following order: [1] "that portion of the estate not disposed of by the will," [2] "property given to residuary legatees and devises," [3] "all other property devised and bequeathed" other than by specific devise or legacy, and [4] "specific devises and legacies." There being no property of the estate passing by intestacy, the expenses of administration, including the extraordinary compensation in question, were chargeable generally against all the property otherwise distributable to the residuary trust without differentiation as to the burden to be borne by any beneficiary's particular interest. [See Estate of Stauffer [1959] 53 Cal.2d 124, 129-131.]

The executor seeks to sustain the charging of extraordinary compensation against contestants' trust shares by arguing that "[i]t would have been

manifestly unfair for a noncontesting beneficiary to participate in the burden of that expense incurred by the contesting beneficiaries," and that "[t]he allocation of fees and costs is fully supported by the broad equitable discretion of the trial Court in assessing such fees and costs to the respective parties." The trial court had discretion to charge contestants with costs of suit [§§ 1232] and acted within this authority in awarding such costs against contestants in the amount of $774.47. However, the court's authority to award costs did not include power to impose upon contestants the entire burden of the extraordinary compensation of the executor and its attorneys for conducting the executor's defense against the contests. [Code Civ. Proc., §§ 1021; Estate of Marré, supra, 18 Cal.2d at p. 191; Estate of Harvey [1964] 224 Cal.App.2d 555, 561; Estate of Bevelle [1947] 81 Cal.App. 2d 720.] A contrary rule would unduly deter contestants such as these from questioning the stewardship of executors and administrators through pro-

ceedings brought in good faith.

Interest on Deferred Payment of Executor's Compensation

In its order of September 28, 1970, settling the executor's account except as to issues raised by the contests, the probate court approved $8,210.50 as the remaining balance of the executor's statutory compensation (§§ 901) and $7,750 as extraordinary compensation to the executor for services rendered on or before September 4, 1970, but provided that payment of these amounts should not be made until the contests were concluded. The judgment on the contests entered August 1, 1972, now before us, provides "that interest in the sum of $1,955.17 computed at the rate of 7% per annum on the withheld balance of statutory compensation and extraordinary services for [the executor] pursuant to this court's order of September 28, 1970, which interest is computed from said date to the date hereof is allowed [the executor]."

This allowance of interest was error. It is settled that noncontractual interest on a creditor's claim against an estate does not begin to run when the claim is allowed but only when it is ordered paid. (Palmer v. Gregg (1967) 65 Cal.2d 657, 661; Hilton v. McNitt (1957) 49 Cal.2d 79, 83.) An analogous principle precluded any award of interest on allowances of executor's compensation for a period during which payment had been expressly ordered deferred pending occurrence of a future event.

The judgment of August 1, 1972, is modified by striking therefrom the provisions for (1) charging extraordinary compensation of the executor and its attorneys "against the principal share of the Contestants' trusts" and (2) allowing interest on the withheld amounts of executor's statutory and extraordinary compensation allowed in the order of September 28, 1970. As so modified, the judgment is affirmed. The order for payment of attorney's fees for extraordinary services, dated and filed on November 17, 1972, is

affirmed. Each party shall bear its own costs on appeal.

WRIGHT, C.J.

WE CONCUR:

MCCOMB, J.
TOBRINER, J.
MOSK, J.
SULLIVAN, J.
CLARK, J.
TAYLOR, J.*

*Assigned by the Chairman of the Judicial Council.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF EL DORADO

Estate of: SETH G. BEACH, etc., Deceased.	No. 5204 MEMORANDUM DECISION

This matter is once again before the Court, this time on a contested request for payment of fees and costs on conclusion of contest.

On November 17, 1972, the Court made its order for fees for extraordinary services by the executor's attorneys in the sum of $14,500.00. At that time the request for extraordinary fees by the attorneys was reduced due to the amount they were awarded for statutory fees.

Thereafter, the case went up on appeal with the Court of Appeal reversing the trial Court's judgment holding that the trial Court failed to apply the proper standard of care to the executor, but affirming the trial Court's determination of extraordinary fees to the executor's attorneys.

A hearing was granted by the California Supreme Court, which decided Estate of Beach (1975) 15 Cal. 3d 623. In a unanimous opinion, the Supreme Court affirmed the trial Court's holding that the executor was not liable to the estate. It modified the ruling as to interest on compensation and stated that the extraordinary compensation should have been charged against the entire estate, not just the contestants' shares.

The present petition by the Bank requests that it be allowed to pay its attorneys, CULLINAN, BURNS & HELMER, the sum of $48,300.00, which represents the sum of $46,500.00 for the appellate process and $1,800.00 for the preparation and appearance on this petition.

The contestants and appellants represented by GEORGE M. McCLARRINON, ES., contend the Court in the exercise of its discretion should not allow such an "excessive" amount of fees, but there is no claim that the hours claimed were not actually spent.

MARIANNE BEACH EDWARDS, who repre-

sented herself, contends the California Supreme Court violated her due process guarantees by charging her interest with extraordinary compensation when she was not an active participant in the contest. Further, she contends that a final distribution has been made to her and the Court lacks jurisdiction.

Disposing of the EDWARD'S contention, although the Court is sympathetic having ruled for her position in the past as not being a contestant, the ruling of the California Supreme Court is binding. In establishing its position that fees should be imposed upon all beneficiaries, the Supreme Court stated: "A contrary rule would unduly deter contestants such as these from questioning the stewardship of executors and administrators through proceedings brought in good faith." Estate of Beach, supra, page 646.

Simply because Mrs. Edwards was the eldest beneficiary and the judicial process went through the full gamut of time, she should not be excused from paying her share of the expenses. The

Court still has the jurisdiction to achieve that end.

As to the attorney fees requested by Mr. Cullinan, the Court finds them to be fair, necessary, and reasonable.

The decedent himself selected Mr. Cullinan, a friend, to draw the will and, in fact, directed in the will that the executor employ Mr. Cullinan as its attorney.

Although the hourly rate, ranging from $75.00 to $110.00 per hour, is higher than this court has allowed in the past, the Cullinan firm is one of the superior probate firms in the state, Mr. Cullinan actually was charged with this monetary amount of work in progress in the Beach Estate when his partnership with Mr. Hancock was dissolved, the matter was complex, difficult, and of significance. The result was excellent. Under these unique circumstances, the requested fees are reasonable for this jurisdiction.

The proposed order re payment of fees and costs on conclusion of contest is approved.

Counsel for the Bank is directed to prepare a formal order.

Dated: June 22, 1976

WILLIAM E. BYRNE
Judge of the Superior Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND FOR
THE THIRD APPELLATE DISTRICT
(El Dorado)

Estate of SETH G. BEACH, aka SETH BEACH, Deceased.	3 Civil 16244 (Super. Ct. #5204)
MARIANNE BEACH EDWARDS, Contestant and Appellant.	
JOETTE BEACH CARTER and MYRLE A. TRAVAILLIE: Guardian of SCOTT GREGORY BEACH AND SCHUYLER JEAN BEACH, Contestants	FILED Feb.1,1977
THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, as Executor of the Estate of SETH G. BEACH, Deceased. Respondent.	

BY THE COURT:

Marianne Beach Edwards appeals from a judgment entered after the court determined that the extraordinary services rendered by the executor's attorneys were reasonable and directed her to pay

the executor her pro rata share of such fees.

The statement of facts is set forth in the opinion of the Supreme Court in Estate of Beach (1975) 15 Cal. 3d 623, at pages 629-630. It should be noted that Edwards was not a contestant in that action, that during the pendency of the appeal in that case Edwards requested and was granted a decree of partial distribution which, in the aggregate, resulted in the transfer to her of her entire share of the estate; that she had also filed a document which stated that by acceptance of the final accounting as to her share she was not waiving any rights which she might have as a beneficiary against the executor and trustee. The Supreme Court's remittitur in Beach, supra, was filed on February 2, 1976. Edwards filed a motion to recall the remittitur which was denied on October 6, 1976.

Contrary to her contention, Edwards was not denied due process of law. The apportionment of the attorneys' fees as against her interest was the result of the Supreme Court's determination that such fees constituted an expense of

the administration of the estate; as such, without a statutory or contractual provision, it could not be assessed against the contestants. [Estate of Beach, supra, 15 Cal.3d at pp. 644, 646.] The court held that the fees in question "were chargeable generally against all the property otherwise distributable to the residuary trust without differentiation as to the burden to be borne by any beneficiary's particular interest." [Ibid. at p. 645,] We are bound by that ruling. [Auto Equity Sales, Inc. v. Superior Court [1962] 57 Cal.2d 450, 455.]

Although Edwards characterizes both the order of September 28, 1970, and the order of October 15, 1974, as decrees of final distribution, neither order purported to wind up the estate. [See Probate Code, §§ 1020, 1021, 1066.] The orders were but partial distributions of the total estate. [Probate Code, § 1000.] Therefore the court retained jurisdiction to require Edwards to pay her ratable proportion of the extraordinary attorneys' fees.[1] [See Estate of Beach, supra, 15 Cal.3d at pp. 645, 646; 31 Am.Jur.2d, Executors

and Administrators, § 586, p. 256.]

We reject the contention that Edwards was not timely notified pursuant to section 1034 of the Code of Civil Procedure of the proceedings to fix the fee for extraordinary services. Section 1034 of the Code of Civil procedure applies to "costs," and such costs do not include attorneys' fees. [Estate of Beach, supra, p. 646; Estate of Harvey [1964] 224 Cal.App.2d 555, 561.] She did in fact receive adequate notice of the hearing and was present at the hearing.

The judgment [order requiring appellant to pay her pro rata share of the extraordinary attorneys' fees] is affirmed.

FOR THE COURT:

PUGLIA, P.J.

FRIEDMAN, J.

EVANS, J.

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[1] The Supreme Court was aware that Edwards became eligible for the final third of her trust shares during the pendency of the action. [Estate of Beach, supra, 15 Cal.3d at p. 631.] Respondent points out that Edwards raised the issue in her motion to recall the remittitur.

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**NOTE: MOTION TO RECALL REMITTITUR AND VACATE PORTION OF JUDGMENT, mentioned in QUESTION III above, was summarily denied 6 October 1976.

ORDER DENYING ALTERNATIVE WRIT

No. 23620

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

EDWARDS, Petitioner

v.

THE SUPERIOR COURT OF
EL DORADO COUNTY, Respondent

CARTER ET AL., Real Partied
in Interest

Petition for writ of prohibition/
certiorari DENIED.

SUPREME COURT
FILED
Aug.25,1977

BIRD
Chief Justice

VINCENT CULLINAN, ESQ.
LAWRENCE W. THORPE, ESQ.
CULLINAN, HANCOCK, ROTHERT & BURNS
100 Bush Street
San Francisco, California 94104
(415) 981-5550

Attorneys for Petitioners

FILED
Oct.15,1974

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF EL DORADO

In the Matter of the Estate of SETH G. BEACH, also known as SETH BEACH, Deceased. In the Matter of the Trust for MARIANNE BEACH EDWARDS	No. 5204 ORDER APPROVING FIFTH AND FINAL ACCOUNT OF TRUSTEE ALLOWING FEES AND DECREE OF FINAL DISTRIBUTION

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, as Trustee of the trust created by the will of SETH G. BEACH, also known as SETH BEACH, deceased, for the benefit of MARIANNE BEACH EDWARDS, having heretofore filed its Fifth and Final Account of Trustee and Petition for Final Distribution, and the same coming on this day regularly for hearing,

THE COURT FINDS that notice of hearing of said Fifth and Final Account of Trustee and Petition for Final Distribution has been given in all respects as required by law; the facts alleged in said Fifth and Final Account of Trustee and Petition for Final Distribution are true, and the Fifth and Final Account of Trustee is approved and the fees are allowed and charged and distribution is ordered as follows:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Fifth and Final Account of Trustee is hereby approved, allowed and settled in all respects as set forth therein and all acts of the trustee as set forth therein are approved specifically.

2. The trustee is hereby directed to distribute the following assets of the trust estate to MARIANNE BEACH EDWARDS after making payment of authorized trustee's and attorneys' fees, all of the remaining balance of principal and undistributed income of the remaining 1/3 of her share of the trust assets as a final distribution of her share of the trust, and the administration of this trust for the benefit of MARIANNE BEACH EDWARDS thereupon be brought to a close:

(a) Cash realized on liquidation of 3,567 units of Common Trust Fund "C" in the amount of $32,558.61;

(b) 1,536 shares of Mother Lode Bank common stock;

(c) 2,058 shares of Reserve Oil and Gas common stock;

(d) Undivided 1/4 interest in $9,176.15 note secured by deed of trust dated 7/21/69 at 7% from Martha J. Henniger.

(e) Undivided 1/12 interest in approximately 86 acres of unimproved real property, located in Sec.19, El Dorado County, California, descrived on Exhibit "A" attached hereto and hereby incorporated herein;

(F) Undivided 1/12 interest in 5 unsecured promissory notes, numbers 36 through 40, dated 11/15/63 issued by Cold Springs Golf and Country Club; and

(g) Cash in the approximate amount of $1,008.15, including cash receipts from the date of the accounting to the date hereof, subject to the terms hereof.

3. The fee of the trustee, THE BANK OF CALIFORNIA, NATIONAL ASSOCIA_ TION, in the amount of $1,191.50 for its ordinary services to the trust is allowed.

4. The fee of the law firm of CULLINAN, HANCOCK, ROTHERT & BURNS, attorneys for the trustee, of $195 for their ordinary services to the trust is allowed.

5. The trustee's and attorneys' fees are to be charged to one-half against income and one-half against principal of the trust estate.

DATED this 11th day of October, 1974.

WILLIAM E. BYRNE
JUDGE OF THE SUPERIOR COURT

APPENDIX C

These notes are included for clarifications and proper adjucation of the attached petition.

The judicial process from which I seek relief was irregular in that the process involves a surprise decision of the state's highest court. Therefore, I include these statements:

This petition's timeliness is based upon the 25 August 1977 denial by the Supreme Court of the State of California of my petition for extraordinary relief.

The absence of my participation in the judicial processes from which I seek relief predetermines the absence of a record accompanying this petition. The entire file no. 5204 Estate of Beach in the Superior Court of the State of California In and For El Dorado County, which is the probate court, I estimate would weight about 35-45 pounds. The heavy weight of these documents is directly proportional to the success

lawyers have achieved in infiltrating their influences in order to claim fees. However, because I was not a party to the processes leading to Estate of Beach, supra, I hereby respectfully claim any document in the entire estate of my father, Seth G. Beach, necessary for adjudication of my ordeal be declared part of the clerk's record.